No. 14,912

IN THE

United States Court of Appeals

For the Ninth Circuit

ANNE G. MOHOLY, as Administratrix of the Estate of Philip F. Moholy, Deceased, and ANNE MOHOLY,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLANTS' OPENING BRIEF.

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OPINION BELOW.

The memorandum opinion of the District Court (R. 14-19) is reported in 132 F. Supp. 32.

JURISDICTION.

The appeal involves Federal income taxes for the calendar year 1949.

On March 14, 1953, within the time allowed by law, appellants filed a claim for refund in the sum of $209.00 together with interest thereon. This claim for refund was not granted by the Commissioner, and after the elapse of more than six months, as provided in Section 3772 of the Internal Revenue Code, this action was brought in the District Court by the filing of a complaint on April 13, 1954, seeking recovery of this amount. (R. 3-9). The jurisdiction of the District Court rested on 28 U.S.C., Section 1340.

On August 3, 1955, the District Court gave a judgment in favor of the plaintiffs in the sum of $134.00 together with interest thereon in the sum of $42.99 without costs and gave judgment in favor of the defendant, United States of America, on the remainder of the plaintiffs' claim. Notice of appeal was filed on September 22, 1955. (R. 21.) The jurisdiction of this court is invoked under 28 U.S.C., Section 1291.

QUESTION PRESENTED.

Whether under Section 22(b)(5) I.R.C., then in effect, sick benefits paid in 1949 to Captain Philip F. Moholy, a fireman, by his employer, the City and County of San Francisco, pursuant to the terms of its charter and the regulations thereunder, should be excluded from gross income as amounts received through health insurance as compensation for sickness.

STATUTE AND REGULATIONS INVOLVED.

The applicable provisions of the statute and regulations are set forth in Note 1 Appendix, *infra.*

STATEMENT OF THE CASE PRESENTING THE QUESTIONS INVOLVED AND THE MANNER IN WHICH THEY ARE RAISED.

The facts of this case are not in dispute. During the year 1949 Philip F. Moholy was employed by the San Francisco Fire Department with the rank of Captain. On August 24, 1949, while answering a fire alarm, he was thrown from a fire truck and sustained serious personal injury. He was placed in Ward A of the San Francisco Hospital and his hospital and medical expenses were paid by the retirement board of the City and County of San Francisco. He also received disability pay, during the period he was unable to work, in the sum of $900.00. During the same year, Captain Moholy suffered from bronchitis and was ill and unable to work for a period of 35 days. Pursuant to the provisions of the charter, ordinances, and regulations of the City and County of San Francisco, he received sick pay during the period in which he was unable to work. The total amount received by Captain Moholy as sick pay during the year 1949 was $489.17. Plaintiffs claimed in their complaint that the sum of $900.00 constituted "amounts received under Workmen's Compensation Acts as compensation for personal injuries", and that the sum of $489.17 constituted "amounts received through accident or health

insurance". After the trial, the District Court requested Counsel to file briefs, and in the defendant's reply brief it conceded that the sum of $900.00 was received under Workmen's Compensation Acts as compensation for personal injuries, and the District Court gave judgment for the plaintiffs on that issue.

The District Court held that the sum of $489.17 received as sick pay while Captain Moholy was ill from bronchitis was not excludible from gross income as "amounts received through accident or health insurance", and gave judgment for the defendant on that issue. Plaintiffs appealed from that portion of the judgment.

STATEMENT OF POINTS TO BE URGED.

Appellants' only point on appeal is that the District Court erred in refusing to exclude from the gross income of Philip F. Moholy for the year 1949 the sum of $489.17 received as sick pay pursuant to the provisions of the city charter of the City and County of San Francisco and the ordinances, regulations, and rules made pursuant thereto.

SUMMARY OF ARGUMENT.

The sick pay provisions of the charter of the City and County of San Francisco and the ordinances, regulations, and rules made pursuant thereto constitute a plan of health insurance. Section 22 of the California Insurance Code defines insurance as "a

contract whereby one undertakes to indemnify another against loss, damage or liability arising from a contingent or unknown event." The circumstances under which Captain Moholy received sick pay contain all of the essential elements of insurance as thus defined. The charter of the City and County of San Francisco is State Law enacted by the State Legislature. Section 153 of the charter was implemented by rule 32 of the Civil Service Commission. Section 11 of that rule specifically gives the Fire Department power to make regulations governing sick pay. Pursuant to such power, the Fire Commission of the City and County of San Francisco adopted the rules designated as "Sick Rule." The pertinent provisions of the so-called "Sick Rule" are set forth in Sections 406 to 431 inclusive of the rules of the Fire Department. (Appendix Note 2.) The rules of the Civil Service Commission and the rules of the Fire Department adopted pursuant to the rules of the Civil Service Commission have the effect of law and confer upon the employee a right which is enforceable at law. The various requirements of the "Sick Rule", such as a requirement for medical reports, immediate notice to the insurer, disqualification for sickness caused by misconduct, are all consistent with a system of health insurance. The system of health insurance set up by law for firemen working for the City and County of San Francisco constitutes a definite plan of insurance and is more unassailable than the sick benefit plans of private companies which have been held to constitute insurance benefits in all three of the cases which have been decided on this question.

ARGUMENT.

THE SICK PAY PROVISIONS OF THE CHARTER OF THE CITY AND COUNTY OF SAN FRANCISCO AND THE ORDINANCES, REGULATIONS AND RULES MADE PURSUANT THERETO CONSTITUTE A PLAN OF HEALTH INSURANCE AND BENEFITS RECEIVED THEREUNDER MUST BE EXCLUDED FROM GROSS INCOME UNDER THE PROVISIONS OF SECTION 22(b)(5) I.R.C.

The term "Health Insurance" is not defined in the statute, nor is the generality of the term limited by any other words or provisions in the law. The words "Health Insurance" do not require or imply that the insurance must be issued by a duly licensed insurance company, that it must be evidenced by a policy of insurance, nor that a premium must be collected from the insured. Section 22 of the California Insurance Code defines insurance as a contract whereby one undertakes to indemnify another against loss, damage or liability arising from a contingent or unknown event. It follows that health insurance is a contract whereby one undertakes to indemnify another against loss arising from sickness. Any enforceable obligation whether evidenced by a policy, a contract or a charter provision or regulation adopted pursuant thereto, whereby one undertakes to indemnify another against loss arising from a contingent or unknown event, constitutes insurance.

The sum of $489.17 was paid to Captain Moholy while he was ill with bronchitis pursuant to Section 153 of the charter of the City and County of San Francisco, Rule 32, Section 11 adopted by the Civil Service Commission and the sick leave rules of the Fire Department, all of which are set forth in full

n Note 2 of the Appendix, *infra.* It is well settled hat the charter of the City and County of San Fran-isco is State Law effective only when enacted by the State Legislature. *Yosemite, etc., Corporation v. State Board of Equalization* (1943) 59 C.A. 2d 39, 138 P. d 39; *C. J. Kubach Company v. McGuire* (1926) 199 Cal. 215, 248 Pac. 276. The rules of the Civil Service Commission and the rules of the Fire Department dopted pursuant to the rules of the commission have he effect of law and confer upon the employee a ight which is enforceable at law. *Adams v. City and County of San Francisco* (1949), 94 C.A. 2d 586. All ick leaves granted or denied to a fireman by the bat-alion chiefs are subject to review by the department hysician. The fireman is specifically given the right o appeal to the Civil Service Commission under the rovisions of Section 8, Rule 32 of the rules of the Civil Service Commission.

The trial court oversimplified the issue as shown by he following extract from the opinion: " 'Sick leave vith full pay' is an ordinary, well-understood phrase. Health insurance' is likewise an ordinary, well-un-erstood phrase. Taking their ordinary meaning, they re not the same. Sick leave pay is just not 'amounts eceived through health insurance'." This superficial nalysis completely misses the point. No one contends hat sick leave with pay is synonymous with health nsurance. Many employers give their employees full ay during periods of illness under circumstances or rrangements which would not qualify such payments s amounts received through health insurance. How-

ever, when all of the requisites of health insurance are met there is no reason why the benefits cannot equal the full pay of the employee. Where, as in this case, an employer for a valuable consideration agrees to assume the risk of loss by entering into a legally enforceable undertaking to pay the employee compensation for sickness, all of the requisites for health insurance have been met. Such payments do not lose their character as benefits from health insurance merely because their amount is measured by the employee's regular rate of pay. This view has received the support of the Commissioner of Internal Revenue on at least three occasions. Note 3 Appendix, *infra.*

Appellants' interpretation of the meaning of health insurance as used in the statute is supported by every reported decision except the memorandum opinion of the court below.

Our interpretation of the meaning of "Insurance" is the interpretation given by the United States Court of Appeals for the Seventh Circuit in the case of *Epmeier v. U.S.* (1952), 199 F. 2d 508, 42 A. F. T. R. 716. The employer in the *Epmeier* case was a private corporation instead of a political subdivision of the state as in this instant case. With this immaterial difference, everything said in the *Epmeier* case is equally applicable to the issue before this court, and we therefore wish to set forth in full the discussion in the opinion of the Circuit Court of Appeals, at page 509:

> "(1) Insurance, of ancient origin, involves a contract, whereby, for an adequate consideration,

one party undertakes to indemnify another against loss arising from certain specified contingencies or perils. Fundamentally and shortly, it is contractual security against possible anticipated loss. Risk is essential and, equally so, a shifting of its incidence from one to another. Physicians' Defense Co. v. Cooper, 9 Cir., 199 F. 576; Jordon v. Group Health Ass'n, 71 App. D.C. 38, 107 F.2d 239; Old Colony Trust Company v. Commissioner of Internal Revenue, 1 Cir., 102 F. 2d 380; Alliance Ins. Co. v. City Realty Co., D. C., 52 F. 2d 271; Meyer v. Building & Realty Co., 209 Ind. 125, 196 N. E. 250, 100 A. L. R. 1442; 44 C. J. S., Insurance, s 1, p. 471; 29 Am. Jur. 47, Sec. 3; 1 Bouvier's Law Dict., Rawle's Third Revision, p. 1613; Webster's International Dictionary, 2d Ed. 1942, p. 1289.

"In determining whether the benefits under consideration are within the statute and in accord with these general principles, we observe, first, that the plan under which the payments were made is not in the physical form of ordinary formal insurance contracts sold commercially, but instead is included in a company document with other subject matters having to do with the employer-employee relationship. But we know of no reason why insurance protection must be expressed in a formal policy.

"(2) True, no money was paid by the employee for the protection, but we think full and complete consideration lay in the contract of employment, by virtue of which, when the employee entered employment and passed a medical examination, he automatically became insured. In other words, the assumption of the risk involved and

indemnity against it were part and parcel of the compensation payable to the employees by the employer. We perceive of no reason why this is not as adequate a consideration for an insurance contract as a specified cash premium. We find no implication in the language of the document that the employer was providing a gratuitous benefit but, on the contrary, the intimation is that the indemnity provided supplemented and added to the terms of employment, by assuring the employees of sickness benefits under the conditions specified.

"A medical examination is a common insurance requirement. The distinction, in the plan here, between employees who did not pass and those who did is closely akin to the ordinary insurance requisites of risk measurement and assumption.

"Though, as to life insurance benefits, under the plan, each employee was required to name a beneficiary, there was no such requirement for sickness benefits, obviously, however, we think, because they were to be paid only to the employee during his lifetime. The provision for termination satisfies the normal requisite of an insurance contract, by defining the risk in terms of time. Provision is made for instances of successive illnesses, thus defining within definite limitations the total benefits for which the company agrees to be liable. It is provided that in case of payment of workmen's compensation for injuries or illness the company will not pay the benefits except to the extent of any excess in them over the compensation payments. The plan warrants no inference that the amount payable represents anything other than sickness benefits,

payable only when wages and salaries could not be earned. It makes the basis for the benefits, the length of service and compensation of the employee, factors consistent with the ordinary provisions of a formal insurance contract. The employee is required while ill, to follow the instructions of his physician or the company's physician, a provision closely akin to features of ordinary insurance, where the insurer is interested in avoiding extension of any resulting loss beyond that which can be reasonably avoided. We find in these and other provisions attributes of and incidents to insurance in every sense of the word.

"(3) Though the benefits are described as free, if the nature of the contract be given careful consideration, it is readily apparent that the word is used not in the sense of a donation or gratuity but rather with the meaning that no premium other than that included in the employee's services is to be paid. Benefits paid out under such an agreement are obviously a part of the employer's corporate operating costs, which include social security and unemployment taxes, workmen's compensation insurance, employer's liability insurance, maintenance of satisfactory working conditions and many other elements, all of which go into the make-up of the total cost. We conclude that 'free' life insurance, 'free' sickness benefits, 'free' medical facilities, as used here, mean simply that these matters are furnished as additional factors of the employee's compensation, free of any money advancement. The provisions of Section 22(b) (5) undoubtedly were intended to relieve a taxpayer who has the

misfortune to become ill or injured, of the necessity of paying income tax upon insurance benefits received to combat the ravages of disease or accident.

"(4) As we have indicated, we know of no reason why this insurance, when provided as a part of the contract of employment between employee and employer, must follow any stereotyped or conventional form. Surely there is no legal magic in form; the essence of the arrangement must determine its legal character. We conclude that the fact that there is no formal contract of insurance is immaterial, if it is clear as here, that, for an adequate consideration, the company has agreed and has become liable to pay and has paid sickness benefits based upon a reasonable plan of protection of its employees.

"The District Court was of the opinion that, though the plan was 'an incident of the employer-employee relationship as the plaintiff points out,' it did not create a contractual liability to pay 'Health insurance,' as there was no consideration for such a promise. This conclusion, it felt, was supported by the further provision that 'the contents' of the document 'may be changed from time to time as better thoughts occur.'

"We have pointed out wherein we think adequate consideration lay in the agreement of employment. Though no formal written contract of employment existed, the plan became effective, immediately and automatically, upon the employee's entering service and passing satisfactorily a medical examination. As we view it, all provisions then became binding upon the respective parties. As a consequence, if an em-

ployee became ill, he had a right to sickness benefits as a part of his contract. We do not doubt that had the employer refused payment, the employee might have enforced this liability.

"The provision that the terms of the agreement may be changed does not impinge upon the soundness of this conclusion. Employment contracts are always subject to revision. If the terms of such changes are not satisfactory to the employee, he may terminate his service; he can not be forced to work under conditions repugnant to his sense of what is fair and proper. It is obvious, also, we think, that no change could be made to defeat or lessen the liability, once it had attached. In the provisions lies the implicit agreement to pay the benefits until and unless the terms should be modified; no such modification could reduce the liability for sickness benefits after illness had intervened.

"We conclude that the amount paid the taxpayer for sickness benefits was exempt from income tax under the statute. The judgment is reversed with directions to proceed in accord with the announcements herein contained."

The court below attempts to distinguish the *Epmeier* case by saying "I do not read *Epmeier* as holding that all payments by an employer of full pay when the employee is on sick leave are excludible from gross income." Of course no one reads *Epmeier* as holding that *all* payments by an employer of full pay when the employee is on sick leave are excludible from gross income. However, when such payments are made under a plan of health insurance they are excludible.

The court below also adverts to the fact that Epmeier's employer was an insurance company.

It is respectfully submitted that there is not one word in the opinion in the *Epmeier* case which indicates that the decision was affected in any way by the fact that the employer was an insurance company. Unfortunately, the court below did not have the benefit of two subsequent district court cases which follow and support the *Epmeier* decision. In each case the employee involved worked for a telephone company and not an insurance company. In *Arthur E. Herbkersman v. U. S.* (1955), 133 Fed. Supp. 496, the plaintiff was an employee of American Telephone and Telegraph Company. The employer had a plan whereby it undertook to pay certain definite amounts to its employees where they were disabled by accident or sickness. All employees who have completed two years of employment are eligible for sickness or accident benefits under the plan, the amount and duration of such benefit payment being determined by the salary and length of service of the employee. We believe there is no material difference between the plan of the American Telephone and Telegraph Company and that of the City and County of San Francisco involved here. Certainly, the following statement by the court is equally applicable to this case:

> "Insurance requires an undertaking, a consideration, a consideration therefor, and a transfer of risk. Section 1 of the Plan very definitely and decisively states that the Company 'undertakes

to provide for the payment of definite amounts to its employees when they are disabled by accident or sickness'.

"Under the Plan the employer undertakes to assume the risk which would otherwise be borne by the employee of loss of income during periods of disability resulting from sickness and the risk is thereby transferred from the employee to the employer and this transfer of risk creates in itself a contract of insurance. While no monetary consideration is paid by the employee for the protection afforded under the Plan the acceptance of employment with the Plan being a feature thereof constitutes a full and adequate consideration. Consideration need not necessarily be a transfer of money, it may be anything of value.

"It was held in Epmeier v. U. S. 199 F.2d 508 (4) (7th Cir.) (42 AFTR 716) involving an employees' benefit plan similar in some respects to the one here in question that where employer for adequate consideration agreed and became liable under agreement to pay, and did pay, sickness benefits to an employee, based on a reasonable plan of protection to employees, employee was entitled to benefits of provision of Internal Revenue Code excluding from gross income and exempting from taxation amounts received through health insurance as compensation for sickness, notwithstanding there was no formal contract of insurance."

In *Haynes v. U. S.* (Jan. 28, 1955), U. S. District Court, N.D. of Ga., Atlanta Division, No. 5001 (unreported except in 1955 Prentice-Hall Federal Tax Service, p. 72, 535), the court made a similar hold-

ing in a case involving an employee of the Southern Bell Telephone and Telegraph Company. In that case the defendant argued that the payments received by the employee were additional compensation or compensation for past services. The court held:

> "The $2100.00 received by the Plaintiff, Gordon P. Haynes, from which the $318.44 income tax was withheld, was paid to him as sick benefits and constituted amounts 'received through health insurance as compensation for sickness' within the meaning of Title 26, U.S.C.A. Sec. 22(b)(5), and the inclusion of such amount in the gross income of plaintiffs was improper.
>
> "The view of the defendant that the payments were 'additional compensation' or 'compensation for past services' does not find support in the record.
>
> "The employer becomes the insurer and the benefits are paid only when the employee is ill—if he is not ill, he does not receive them.
>
> "Only the value of the protection may be properly treated as additional compensation or income—not the benefits which depend not upon service, but upon duration of illness.
>
> "It was held in Epmeier v. United States, 199 F.2d 508(4) (7th Cir.) (42 AFTR 716):
>
> > 'Where employer for adequate consideration agreed and became liable under agreement to pay and did pay, sickness benefits to an employee based on a reasonable plan of protection to employees, employee was entitled to benefits of provision of Internal Revenue Code excluding from gross income and exempting from

taxation amounts received, through health insurance as compensation for sickness, notwithstanding there was no formal contract of insurance.'

"This question has thus been decided adversely to the contentions of the defendant and it seems that the Commissioner of Internal Revenue has refused to follow that holding (See 39 A.B.A. 450), although that opinion seems to this Court to be sound."

We can find little to add to the language used in he *Epmeier* case. Every argument advanced by the ppellee in the court below is carefully analyzed nd answered in the *Epmeier* opinion. With the imaterial difference that the employer in the *Epmeier* ase was a private insurance corporation and the emloyer in this case is a political subdivision, everyhing said in the *Epmeier* opinion is equally applicable o the issue before this court, and we believe that the pinion which we have set forth above constitutes a lear and cogent presentation of the principles aplicable to the instant case.

CONCLUSION.

For the foregoing reasons the portion of the judgnent of the District Court from which this appeal is aken should be reversed and remanded to the Disrict Court with directions that the District Court nter judgment for appellants and against the de-

fendant in accordance with the prayer of the complaint.

Dated, San Francisco, California,
January 30, 1956.

CLYDE C. SHERWOOD,
Attorney for Appellants.

JOHN V. LEWIS,
Of Counsel.

(Appendix Follows.)

Appendix.

Appendix

NOTE 1. Plaintiffs' claim is based upon Section (b)(5) of the Internal Revenue Code which read as lows during the year involved in this action:

"I.R.C. Sec. 22

"(b) *Exclusions from Gross Income.* The following items shall not be included in gross income and shall be exempt from taxation under this chapter:

"(5) *Compensation for injuries or sickness. Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 23(x) in any prior taxable year,* amounts received, through accident or health insurance or under workmen's compensation acts, as compensation for personal injuries or sickness, plus the amount of any damages received whether by suit or agreement on account of such injuries or sickness, *and amounts received as a pension, annuity, or similar allowance for personal injuries or sickness resulting from active service in the armed forces of any country.*" (Emphasis added.)

NOTE 2. The Charter provision and rules governing e payment of sick benefits to firemen by the City d County of San Francisco are as follows:

Charter of the City and County of San Francisco, ction 153:

"*Section 153.* The civil service commission by rule and subject to the approval of the board of supervisors by ordinance, shall provide for leaves of absence, due to illness or disability, which leave

or leaves may be cumulative, if not used as authorized, provided that the accumulated unused period of sick leave shall not exceed six (6) months, regardless of length of service, and provided further that violation or abuse of the provisions of said rule and ordinance by an officer or employee shall be deemed an act of insubordination and inattention to duties."

Pursuant to the authority given in Section 153 of the *Charter,* the Civil Service Commission adopted Rule 32. Section 11 of Rule 32 reads as follows:

"Section 11. **Police and Fire Departments.** Sick leaves and disability leaves granted to members of the uniformed forces of the Police Department and Fire Department shall be regulated by rules adopted respectively by the Police Commission and Fire Commission which rules, and amendments thereto, shall be subject to the approval of the Civil Service Commission, and when so approved by the Civil Service Commission shall be deemed as included in this rule. (Sick leave rules of the Fire Department approved Minutes of April 18, 1945. Sick leave rules of the Police Department approved as amended Minutes of February 15, 1950.)"

During the year 1949 the Fire Commission of the City and County of San Francisco maintained in full force and effect Sections 406 through 431 of the rules of the Fire Department entitled "Sick Rule" as follows:

"SICK RULE

406. The officers and members of the uniformed force of the Department shall be entitled

to sick leaves and disability leaves with full pay subject to the provisions of this rule as hereinafter defined, and all other employees of the Department shall be entitled to sick leaves and disabilities in accordance with the provisions of Rule 32 of the Rules of the Civil Service Commission.

407. A leave of absence granted under this rule, with full pay because of illness or injury, and not covered by Section 408 of this rule, shall be known as 'Sick Leave.'

408. A leave of absence granted under this rule, with full pay, for one of the following causes, shall be known as 'Disability leave':

a. Absence due to quarantine established and declared by the Department of Public Health or other competent authority, and shall be for the period of quarantine only.

b. Absence necessitated by death of mother, father, husband, wife, child, brother, or sister; provided that in such case the leave shall not extend beyond the date of burial of said deceased person.

c. Absence necessitated by death of other relatives; but leave with pay in such cases shall be for not more than one day to permit attendance at the funeral of said person.

d. Absence due to disability caused by illness or injury arising out of, and in the course of, employment.

409. Members of the Department who have regularly occupied their positions continuously for at least one year shall be entitled to two weeks' sick leave with full pay, annually, during their employment in the Department. Such annual sick

leave of two weeks, with pay, when not used, shall be cumulative, but the accumulated unused period of sick leave shall not exceed six months regardless of length of service.

410. Members of the Department shall be entitled to an accumulation of two weeks' sick leave with pay for each year of service, until the maximum of six months' accumulation has been reached, provided that when said maximum accumulation of six months has been reached, and thereafter part of said maximum has been used, the used part of said maximum may again be replenished at the rate of two weeks for each subsequent year of service. Sick leaves with pay allowed since the present Charter became effective on January 8, 1932, shall be deducted from above mentioned accumulations.

411. Members of the Department who are absent from duty because of disability arising out of and in the course of employment shall be entitled to full pay; the extent of such absence to be determined by the Board of Fire Commissioners.

412. The benefits obtainable under this rule shall automatically terminate on the date of retirement on pension of such members receiving benefits thereunder.

413. Sick leave with pay granted under this rule shall be indicated on pay rolls and time sheets by the letters 'S.P.' (sick leave with full pay); and disability leaves with pay granted under this rule shall be indicated on pay rolls and time sheets by the letters 'D.P.' (disability leave with full pay).

414. When a member of the Department becomes sick or disabled to such an extent as to render him unable and unfit to properly perform his required duties in the Department, he shall report the fact, or cause the same to be properly reported to the officer of the company to which he may be detailed at the time for duty. The officer receiving such report shall immediately notify his Battalion Chief then on duty, who shall promptly investigate the same and, if he deems it necessary, shall grant said member a sick leave. All such leaves, when granted, shall be immediately reported to the Bureau of Assignments together with the member's address and all other available pertinent information. The assignment officer shall record the facts as reported and in turn shall report the same to the Department Physician.

415. When a member of the Department applies for a disability leave as defined in Paragraphs (a), (b) and (c) of Section 408 of this rule, an application in writing and addressed to the Board of Fire Commissioners must be submitted, and the same shall be investigated and if in order, indorsed by the company officer and Battalion Chief.

416. When a member of the Department, while on duty, receives an injury or disability arising out of and in the course of employment as defined in Paragraph (d) of Section 408 of this rule, the officer of the company to which he belongs or to which he may be detailed for duty at the time, shall immediately notify his Battalion Chief then on duty, and shall make out a written report in duplicate, covering all facts in the case, and the

Battalion Chief shall make a thorough investigation of the same, and, if circumstances warrant, he shall indorse and forward one copy of the report to the Chief of Department. An entry regarding such injury or disability shall also be made in the company journal.

417. If the injury or disability received by said member is of such extent as to render him unable or unfit to properly perform his required duties in the Department, the Battalion Chief shall grant him a disability leave and report the same to the Bureau of Assignments together with the member's address and all other pertinent information. The officer at the Bureau of Assignments shall record the facts as reported and in turn shall report the same to the Department Physician.

418. When a member of the Department, while off duty, receives an injury, or becomes sick to such an extent as to render him unable or unfit to properly perform his required duties in the Department, he shall report the fact, or cause the same to be properly reported to the officer of the company to which he is assigned or to which he may be detailed for duty at the time. The officer receiving such report shall immediately notify his Battalion Chief then on duty, who shall promptly investigate the same and, if the circumstances warrant, he shall grant said member a sick leave.

419. All such sick leaves when granted, shall immediately be reported to the Bureau of Assignments together with the member's address and all other available pertinent information, and the assignment officer in turn shall report the same to the Department Physician.

420. It shall be the duty of the Department Physician to visit all members who have been granted sick leaves or disability leaves and who are confined to bed, as soon as possible after having been advised thereof by the Bureau of Assignments, and investigate the nature of the illness or injury, and in the event of any violations of these rules or other irregularities encountered by him, he shall consult with the Chief of Department and, if required, shall render a written report thereon. All sick leaves or disability leaves granted or denied to a member by Battalion Chiefs in compliance with the provisions of Sections 414 to 418 of this rule shall be subject to review by the Department Physician, and nothing herein contained shall abrogate the right of a member to appeal to the Civil Service Commission under the provisions of Section 8, Rule 32, Rules of the Civil Service Commission.

421. Any member of the Department who has been granted a sick leave or disability leave and whose illness or disability does not necessarily confine him to his home or to a hospital shall report in person to the Department Physician within forty-eight hours and as often thereafter as the Department Physician may direct.

422. All members of the Department who have been granted a sick leave or disability leave shall within forty-eight hours, and weekly thereafter, file with the Department Physician a certificate from a regularly certificated physician clearly stating the nature of the sickness or disability.

423. Except in cases of emergency, no member of this Department shall submit to a surgical operation as a result of which he would be prevented

from performing his required duties in a satisfactory manner, until after permission from the Department Physician.

424. Any member who becomes sick or disabled through intemperance, vicious habits, immoral or unlawful acts or through the reckless negligence of his person or health, shall not be entitled to any salary or compensation from this Department during such sickness or disability.

425. Members off duty on sick or disability leave shall not be permitted to leave the City without having obtained the consent of the Board of Fire Commissioners.

426. No member off duty on sick leave or disability leave, as defined in Paragraph (d) of Section 408 of this rule, shall be absent from his residence or place of confinement after 8 o'clock P. M., except by permission of the Chief of Department.

427. Company officers shall immediately report to their respective Battalion Chiefs then on duty, whenever a member of their respective companies who had been off duty on sick leave or disability leave reports back for duty, and the Battalion Chief to whom the report is made shall immediately notify the Bureau of Assignments who shall record the same and shall in turn relay the report to the Department Physician.

428. Violation or abuse of any of the provisions of these rules by any member of the Department shall be deemed an act of insubordination and inattention to duties.

429. Battalion Chiefs shall, within forty-eight hours and once in each week thereafter, visit all

members of the Department to whom they have granted sick leaves or disability leaves, provided that said members reside or are located in their battalion districts and further provided that their sickness or disability confines them to their homes or to a hospital. When such members reside or are confined outside the boundaries of their respective districts, they shall immediately, after granting such sick leave or disability leave, notify the Battalion Chief of the district in which said sick or disabled member resides or is confined, and the latter Battalion Chief shall proceed to visit such members as heretofore provided.

430. When a member who has been granted a sick leave or disability leave fails to comply with the provisions of these rules, or fails to obey the orders or directions of the Department Physician, the Battalion Chief in whose district said member resides or is confined shall investigate the circumstances and shall exact strict compliance or file a formal complaint, as the case may warrant.

431. Battalion Chiefs shall submit once a week to the Department Physician a list of all members of their respective districts or who reside or are located therein while on sick leave or disability leave, noting particularly the correct address and whether or not they are confined to bed."

NOTE 3. The Commissioner held, "Unemployment mpensation disability benefits received by em- yees pursuant to Article X of the California employment Insurance Act as amended are cludible from gross income under Section 22)(5) of the Internal Revenue Code." (IT 4015

CB 1950-1, page 23.) He also held, "An employer's private plan for the payment of disability benefits to employees pursuant to Chapter 21, Title 43 of the Revised Statutes of New Jersey as amended and supplemented is a form of health and accident insurance which meets the requirements of Section 22(b)(5) of the Internal Revenue Code. Amounts received by employees under such a plan are excludible from gross income under Section 22(b)(5) of the Code and are not subject to the withholding of income tax at the source on wages under Section 1622 of the Code." (IT 4000 CB 1950-1, page 621.) He also held in regard to New York disability benefits, "It is held that disability benefit payments to employees whether made from the state insurance fund, by an insurance company pursuant to an insurance contract, or under an improved self-insured plan are excludible from gross income of the recipients under Section 22(b)(5) of the Internal Revenue Code as 'amounts received, through accident or health insurance * * * as compensation for personal injuries or sickness' and do not constitute wages for purposes of withholding of income tax at the source." (IT 4060 CB 1951-2, page 11.) However, the following year the Commissioner reversed his position in IT 4107 CB 1952-3, page 73.